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SEAH ENG TOH DANIEL & ANOR v. KINGSLEY KHOO HOI LENG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH DHALIWAL J
[CIVIL SUIT NO: 26-NCC-99-11-2014]
B 9 NOVEMBER 2015

COMPANY LAW: *Oppression – Minority shareholders – Resolutions at extraordinary general meeting to increase authorised capital and paid-up capital – Whether meant to dilute minority shareholders' interest – Whether an attempt to* C *force sell out at unfair price – Whether minority shareholders knew about increase in authorised and paid-up capital – Whether minority shareholders oppressed – Companies Act 1965, s. 181*

COMPANY LAW: *Directors – Removal – Minority shareholders – Claim that company was formed as quasi-partnership – Whether minority shareholders ought* D *not to be removed as directors – Whether minority shareholders contributed in capital injection – Whether registered as majority-minority equity structure to enjoy tax benefits – Whether an arrangement to deceive authorities – Whether against public policy*

E The dispute herein involved two camps of shareholders of the fourth defendant, Progress Petroleum Sdn Bhd ('PPSB'), *ie*, the plaintiffs on one hand and the first to third defendants ('the Khoo Brothers') on the other. The registered shareholding of PPSB was reflected in a 60:40 majority in favour of the Khoo Brothers. However, the plaintiffs contended that there was an understanding between the parties that the partnership would be on a 50:50 F basis and that the first defendant ('Kingsley') would hold 10% of the shares on trust for the plaintiffs. The Malaysian-majority and foreigner-minority equity was agreed upon purportedly because the Malaysian Authority was offering tax exemption on charter fees for ships registered under a Malaysian held majority company. Pursuant to an extraordinary general meeting G ('EGM'), Kingsley and the second defendant ('Kingston') passed resolutions to (i) raise the authorised capital of PPSB; and (ii) have a rights issue of new ordinary shares. Pursuant to another EGM, Kingsley sought to pass a resolution that the plaintiffs be removed as directors of PPSB and directors of all companies within Progress Petroleum Group ('PPG') in Singapore. H The plaintiffs therefore filed an action against the defendants seeking relief for oppressive conduct in the affairs of PPSB pursuant to s. 181 of the Companies Act 1965 ('CA'). The grounds relied upon by the plaintiffs to prove oppressive conduct were: (i) the company was formed as a quasi-partnership with the legitimate expectation that the plaintiffs will not I be removed as directors; and (ii) the dilution of the plaintiffs' shareholdings in the company was wrong and an oppressive act.

Held (dismissing claim with costs):

(1) Whether a company may be characterised as a 'quasi-partnership' company is primarily a question of fact so as to attract the application of the judicial concept. The judicial content of a 'quasi-partnership company' is derived from considerations 'of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way'. From the evidence, it was plain that apart from payments made on commercial charter agreements, no capital injection was ever made by the plaintiffs or Vanguard Energy Pte Ltd ('VEPL'), the Singapore company of which the plaintiffs were shareholders and directors. VEPL never became a shareholder of PPSB and there was no evidence that the plaintiffs themselves paid for their shares in PPSB. (paras 20 & 21)

(2) In fact, VEPL had commenced proceedings in Singapore for purported breaches of contractual arrangements involving VEPL and PPSB concerning the acquisition of commercial vessels. It would thus appear that contradictory claims were being pursued in each jurisdiction. The inconsistent nature of the allegations put forward by the plaintiffs suggested that the instant action was a ploy by the plaintiffs to gain evidence to support the pending proceedings in Singapore in which the plaintiffs appeared to be financially invested. (paras 21 & 22)

(3) Shipping profits will be exempt from tax pursuant to s. 54A of the Income Tax Act 1967. In order to qualify for the tax benefits, the vessel in question must be a Malaysian ship, *ie*, the majority of the shareholding was held by 'Malaysian citizen free from any trust or obligation in favour of non-Malaysians'. Hence, it is the legal requirement that the majority of the shareholding including voting shares was to be held by Malaysian citizen and the majority of the directors are Malaysian citizen. The allegation of a quasi-partnership, even if true, could not justify the grant of any relief in favour of the plaintiffs as it would be against public policy and if accepted, the court would be deemed lending its hand to an arrangement to deceive the authorities. (paras 23, 24 & 26)

(4) In the circumstances of the case and in the absence of any evidence of quasi-partnership, the removal of the plaintiffs or non re-election as directors was a matter for the company to exercise in a *bona fide* manner. The complaint that the directors were removed so that their wrongdoings would be kept hidden forever was made without basis and on disputed material. The question of removal of directors was not a complaint available *qua* shareholder and hence, does not come within the purview of s. 181 of the Companies Act 1965. In the circumstances, a case of oppression had not been made out. (paras 30 & 31)

(5) The power to issue shares is an advantage which belongs to the company itself and may only be utilised *bona fide* in the interest of the company and not for any collateral purpose. The defendants had adequately explained the reasons and justification for the need for an increase in the authorised and paid-up capital of the company. The objective documents showed that the plaintiffs knew about the increase in the authorised and paid-up capital and did not immediately complain about the unfairness of the exercise but only took issue with it some four months later. The plaintiffs were not adversely affected as the increase of capital was across the board and it was not a case of the defendants diluting the plaintiffs' majority. (paras 34-36)

(6) The objective documentary evidence showed that the funds were required due to the substantial losses suffered by the group. Therefore, there was no justification for the court to intervene and there was no basis for any allegation of oppression. (para 38)

Case(s) referred to:

Cheah Ngun Ying v. Low Cheong & Sons Sdn Bhd & Ors [2009] 1 LNS 1498 HC ***(dist)***
Ebrahimi v. Westbourne Galleries Ltd [1973] AC 360 ***(refd)***
Howard Smith Ltd v. Ampol Petroleum Ltd and Others [1974] AC 821 ***(dist)***
Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co Ltd & Ors And Another Appeal [2013] 2 CLJ 277 FC ***(refd)***
Kejutaan Holdings Sdn Bhd v. Magnum 4D (Perak) Sdn Bhd & Ors [2009] 6 CLJ 570 CA ***(refd)***
Kondapuram Raghuram v. Soo Peng & Ors [2006] 5 CLJ 634 HC ***(refd)***
Pan-Pacific Construction Holdings Sdn Bhd v. Ngui-Kee Corporation (M) Bhd & Anor [2010] 6 CLJ 721 FC ***(refd)***
Re a Company (No 005134 of 1986), ex parte Harries [1989] 1 BCLC 383 ***(dist)***
Re Cumana Ltd [1986] 2 BCLC 430 ***(dist)***
Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(refd)***
Re Senson Auto Supplies Sdn Bhd [1987] 1 LNS 110 HC ***(refd)***
Soh Jiun Jen v. Advance Colour Laboratory Sdn Bhd & Ors [2010] 4 CLJ 897 CA ***(refd)***
Suntoso Jacob v. Kong Miao Ming [1986] 2 MLJ 170 ***(refd)***
Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(refd)***
Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors (Consolidated with Other Petitions) [1995] 1 CLJ 250 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 181
Income Tax Act 1967, s. 54A
Merchant Shipping Ordinance 1952, s. 11

Other source(s) referred to:

Loh Siew Cheang, *Corporate Powers Accountability*, 2nd edn, 2002, para 10.10

For the plaintiffs - Lim Chee Wee (Oommen Koshy & Nimalan Devaraja with him); M/s Skrine
For the 1st, 2nd & 3rd defendants - Tharminder Singh (Alexia Lo with him); M/s Izral Partnership
For the 4th defendant - Johan Taing Chee Fae; M/s Shu Yin, Teh & Taing

Reported by S Barathi

JUDGMENT

Harmindar Singh Dhaliwal J:

[1] By this Originating Summons ("OS"), the plaintiffs are seeking relief for oppressive conduct in the affairs of the fourth defendant company ("the company" or "PPSB" interchangeably) pursuant to s. 181 of the Companies Act 1965 ("CA 1965"). The plaintiffs seek to broadly challenge the following or otherwise seek the following relief in these proceedings:

(a) the increase of authorised capital of the company from RM1 million to RM10 million as well as the increase in paid-up capital from RM1 million to RM5.95 million in the form of rights issue;

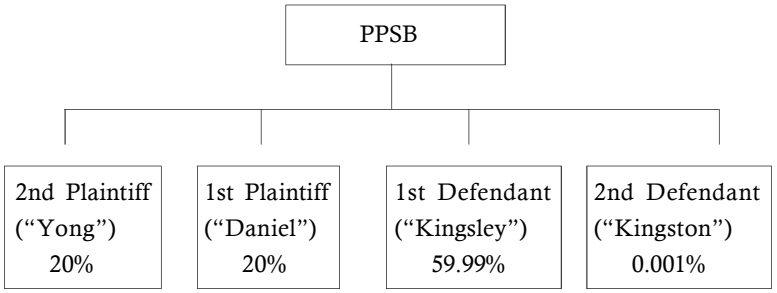
(b) the then proposed removal of the plaintiffs as directors at the EGM held on 27 November 2014;

(c) declaration that the company was a 'quasi partnership'; and

(d) the appointment of a firm of two persons from the Malaysian and Singaporean operations of Grant Thornton to conduct an investigative audit over the company as well as its several subsidiaries.

Background Facts

[2] This is essentially a dispute between two camps of shareholders of PPSB. In one camp there are the plaintiffs and the other camp comprises the first to third defendants who are siblings ("the Khoo Brothers"). The shareholding of PPSB as at 22 July 2013 was as follows:



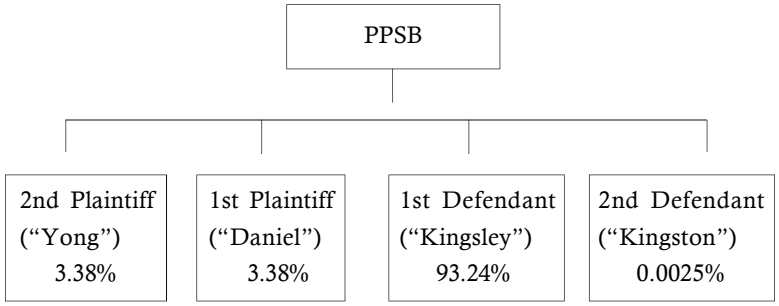
[3] Despite the fact that the Khoo Brothers held 60% of the shares in PPSB, the plaintiffs contend that there was a gentleman's understanding between the parties that the partnership would be on a 50:50 basis and that

A Kingsley would hold 10% of the shares on trust for the plaintiffs. It was further claimed that the only reason that Kingsley was to be registered as a majority stakeholder was because the Malaysian Authority was offering tax exemption on charter fees for ships registered under a Malaysian held majority company. As such, the Malaysian-majority/foreigner-minority
B equity structure was agreed by the plaintiffs as a sound business decision made in the best commercial interest of PPSB and based on the relationship of trust and confidence that existed between the plaintiffs and the defendants.

[4] The plaintiffs and the defendants were all directors of PPSB at the outset, up until 27 November 2014 when the defendants sought to remove
C the plaintiffs as directors.

[5] At an extraordinary general meeting convened on 3 July 2014 ("EGM"), Kingsley and Kingston had exercised their 60% registered shareholding and passed resolutions to (i) raise the authorized capital from RM1,000,000 to RM10,000,000 and (ii) have a rights issue of 4,920,000
D units of new ordinary shares ("resolutions"). The Khoo Brothers then passed a director's circular resolution on the same day to give effect to the resolutions passed at the EGM.

[6] The majority of the 4,920,000 new shares were later allotted to Kingsley on 1 August 2014 in consideration for cash. With the issuance and
E allotment of the new shares, the shareholding of PPSB as at 29 September 2014 was as follows:



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[7] Despite the dilution of the plaintiffs' shareholding, and with a view to an amicable settlement, the plaintiffs proceeded to accept Kingsley's earlier
H offer to buy out all of the plaintiffs' shares in PPSB and asked Kingsley to prepare the accounts and the share sale agreement to enable the plaintiffs to exit with minimal fuss. The plaintiffs also requested that all the companies in the Progress Petroleum Group ("PPG") be audited, and this was readily agreed to at the material time.

I **[8]** Given the agreement of all parties, the plaintiffs' auditor, Grant Thornton Advisory Services Pte Ltd, visited the office of PPG in Singapore on 13 October 2014 and was given access to all books and accounts for the

purposes of the audit. However, access was refused by Kingsley on 28 October 2014 resulting in the auditors only being able to draw up a brief audit report based on the limited information gleamed.

[9] Shortly thereafter, Kingsley proposed that yet another extraordinary general meeting be convened on 27 November 2014 to pass a resolution that the plaintiffs be removed as directors of PPSB and directors of all companies within PPG in Singapore. According to the plaintiffs, this removal was an attempt to justify a discontinuance of the audit and prevent discovery of any wrongdoings on the part of Kingsley and/or the Khoo Brothers so that it would be kept hidden forever.

[10] The plaintiffs then filed the present action seeking the appropriate remedies for the alleged oppressive acts committed against them by the Khoo Brothers as seen in the prayers set out at the outset. By way of background, it should be noted that the plaintiffs did not succeed in their application for an appointment of receivers and managers over the company. The plaintiffs also did not succeed in restraining the holding of the EGM on 27 November 2014. However, an interim position was regulated by consent that the resolution removing the plaintiffs as directors would not be implemented by lodging the relevant returns with the Companies Commission of Malaysia pending the disposal of this action.

Issues And Relevant Law

[11] Considering the factual background as disclosed in the affidavits, the submissions filed and the position taken by the parties, the grounds relied upon by the plaintiffs to prove oppressive conduct which merit consideration can be stated broadly as follows:

(a) The company was formed as a quasi-partnership with the legitimate expectation that the plaintiffs will not be removed as directors (Quasi-partnership Challenge)

(b) Dilution of plaintiffs' shareholding in the company is wrong and an oppressive act ("dilution of shareholding challenge")

[12] Bearing in mind the ambit of the proceedings, it will be sufficient to note the following basic trite propositions in relation to proceedings under s. 181 of the CA 1965, much of which is found in s. 181 itself, as well as the leading cases of *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170; [1978] 2 MLJ 227; *Pan-Pacific Construction Holdings Sdn Bhd v. Ngui-Kee Corporation (M) Bhd & Anor* [2010] 6 CLJ 721; *Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co Ltd & Ors And Another Appeal* [2013] 2 CLJ 277; [2013] MLJU 10; *Kejutaan Holdings Sdn Bhd v. Magnum 4D (Perak) Sdn Bhd & Ors* [2009] 6 CLJ 570; [2010] 3 MLJ 827; *Soh Jiun Jen v. Advance Colour Laboratory Sdn Bhd & Ors* [2010] 4 CLJ 897; [2010] 5 MLJ 342 and *Re Senson Auto Supplies Sdn Bhd* [1987] 1 LNS 110; [1988] 1 MLJ 326:

(a) in order to succeed the plaintiff has to establish that the affairs of the company are being conducted or that the powers of the directors are being exercised in an oppressive manner or in disregard of its interest, or to its prejudice some unfairly discriminatory or prejudicial act of the company has been done or threatened, or that some resolution of the members, debenture holders or any class of them has been passed or is proposed to be passed;

(b) the above matters must be established by the plaintiff according to the facts of the case;

(c) those who take interests in companies limited by shares have to accept the majority rule; and

(d) the courts will not interfere with internal management of companies so long as the acts were *bona fide* and in the interests of the company.

Quasi-Partnership Challenge

[13] The plaintiffs' contention in this regard was that there was always a gentlemen understanding between the parties that the company would be managed on a 50:50 basis between the Khoo Brothers on the one hand and the plaintiffs on the other regardless of the registered shareholding.

[14] It was asserted that this understanding gave rise to a legitimate expectation on the part of the plaintiffs that the company would be managed as a quasi-partnership and that the plaintiffs would be kept involved in the management of the company and its subsidiaries as directors.

[15] It was further argued that while it is accepted that the company was never formed or incorporated as joint entity by the parties (when it was still known as KT Builder Sdn Bhd), the communications and conduct of the parties following Kingsley's approach to the plaintiffs clearly show the parties intention that the company be managed as a quasi-partnership.

[16] The plaintiffs submitted that the understanding of the parties can be seen from the following instances:

(i) Kingsley had approached the plaintiffs in 2010 to expand the business of Vanguard Energy Pte Ltd ("VEPL") into Malaysia (the plaintiffs were the shareholders and directors of this Singapore company) on the basis of partnership and that the plaintiffs involvement was crucial as they were well-known in the shipping industry;

(ii) When the plaintiffs accepted Kingsley's offer to enter into business with him, it was with the understanding that "mutual trust", "earnest assistance", "accountability" and "expectation" would be the ingredients of their relationship. The commercial relationship between the plaintiffs and defendants was one pragmatically based on trust and confidence, as opposed to being strictly formal and at arm's length, in order to get the job done in Malaysia.

(iii) The name of Kingsley's company, KT Builder Sdn Bhd had firstly been renamed as Vanguard Energy Sdn Bhd to reflect the name of the plaintiffs company in Singapore, VEPL;

(iv) Upon the decision of the plaintiffs to group all their business handled by Kingsley under PPG; the name of the company was changed to PPSB and the object of PPSB was also amended accordingly;

(v) Despite the parties' ultimate intention for the partnership to be on a 50:50 basis, VEPL was required to make a substantial capital contribution at the initial stage of the business in Malaysia as Kingsley was suffering from a lack of funds;

(vi) During the course of business of PPG, VEPL had injected a substantial amount of money to purchase ships for the use of PPG. In fact, VEPL provided the initial funds for the acquisition of "the Pelangi Vessels", on the promise by Kingsley that he would subsequently make payment to VEPL representing half of the purchase price and the plaintiffs/ VEPL and Kingsley would then both enjoy equal beneficial ownership of the Pelangi Vessels. This initial agreement was due to Kingsley suffering from a lack of monetary funds, as the business progressed and Kingsley grew in stature, Kingsley no longer needed the plaintiff/ VEPL to provide 100% of the initial funding for future asset purchase, and was in fact able to contribute 50% of the purchase price (ie, his equal share) for the subsequent acquisition of "MT Infinity" and "MT Judge";

(vii) While it was agreed that Kingsley would administer and control all the business affairs in Malaysia (a further example of the trust and confidence the plaintiffs reposed in Kingsley), he was to report to the plaintiffs regularly on the state of affairs of PPSB so that they would remain involved in the management of PPSB; and

(viii) It was always the understanding of the parties that despite the registered majority shareholding of the Khoo Brothers in PPSB, PPSB was always a company under the control of VEPL in the course of effecting the desired ultimate 50:50 partnership.

[17] On this basis, it was submitted that the only reason that the registered shareholding of PPSB was reflected in a 60:40 majority in favor of the Khoo Brothers was because PPSB had to be a majority-owned Malaysian company so that it could enjoy tax benefits. It was solely for the benefit of PPSB that the plaintiffs readily agreed that the shareholding of PPSB be registered in a 60:40 manner despite the understanding and conduct of the parties being that PPSB would be managed in a 50:50 manner.

[18] Further, notwithstanding the registered shareholding of the PPSB, it was always the legitimate expectation of the plaintiffs that PPSB is a quasi-partnership on a 50:50 basis based on the conduct and communications between the parties.

[19] In the House of Lords case of *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360, Lord Wilberforce defined a quasi-partnership in the following manner:

> Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost or one member is removed. from management, he cannot take out his stake and go elsewhere.

[20] However, the three elements singled out in *Ebrahimi* are merely examples of circumstances and do not lay down any firm test (see *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors (Consolidated with Other Petitions)* [1995] 1 CLJ 250; [1994] 3 MLJ 89). Therefore, whether a company may be characterised as a 'quasi-partnership' company is primarily a question of fact so as to attract the application of the judicial concept. The judicial content of a 'quasi-partnership company' is derived from considerations 'of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way' (per Lord Wilberforce in *Ebrahimi*, *supra).*

[21] Having perused the evidence as disclosed in the affidavits, it is plain that no capital injection was ever made by the plaintiffs or VEPL apart from payments made on commercial charter agreements. VEPL never became a shareholder of the company. There is no evidence that the plaintiffs themselves paid for their shares in PPSB. In fact, VEPL (which is now under insolvency) has commenced proceedings in Singapore for purported breaches of contractual arrangements involving VEPL and PPSB concerning the acquisition of commercial vessels.

[22] It would therefore appear that contradictory claims are being pursued in each jurisdiction. In the claim here, there is an assertion of an alleged partnership from alleged substantial capital injection. In the Singapore Court, there is a claim of direct ownership of the vessels apparently acquired on a business understanding. The inconsistent nature of the allegations put forward by the plaintiffs suggests to me that the instant action is a ploy by the plaintiffs to gain evidence to support the pending proceedings in Singapore in which the plaintiffs appear to be financially invested.

[23] In any event, this allegation of a quasi-partnership even if true, cannot justify the grant of any relief in favor of the plaintiffs as it will be against public policy. If the court accepts the plaintiffs' assertion of a quasi-partnership, it would be lending its hand to an arrangement to deceive the authorities.

[24] In this connection, it was not disputed that shipping profits will be exempt from tax pursuant to s. 54A of the Income Tax Act 1967. In order to qualify for such tax benefits, the vessel in question must be a Malaysian ship. The definition of a Malaysian ship is set out in s. 11 of the Merchant Shipping Ordinance 1952. One of the requirements is that the majority of the shareholding is held by "Malaysian citizens free from any trust or obligation in favor of non-Malaysians" (s. 11(b)(iv)).

[25] Now the plaintiffs contend that as there is no requirement and/or restriction under the relevant provisions of the Merchant Shipping Ordinance 1952 and/or Income Tax Act 1967 regarding the manner in which the affairs of a corporation should be conducted or managed to qualify for tax benefits, it was well-within the parties' discretion to reach their own agreement on the manner in which the affairs of PPSB should be conducted and managed.

[26] However, I do not think that this argument can be accepted as a plain reading of the statute dictates that tax benefits accrued only to Malaysian ships which is to be determined according to the majority shareholding. It was the legal requirement that the majority of the shareholding including voting shares was to be held by Malaysian citizens and that the majority of the directors are Malaysian citizens. Any other interpretation, including the one suggested by the plaintiffs, would be inconsistent with the statute with the effect of allowing foreign ships to qualify for tax benefits by deception. Needless to add, this would defeat the purpose for which the law was enacted.

[27] In a somewhat similar case in Singapore, the Court of Appeal in *Suntoso Jacob v. Kong Miao Ming* [1986] 2 MLJ 170 refused to enforce a trust where a deception had been practiced on the public administration. The brief facts were that by administrative guidelines issued by the Registrar of Ships, Singapore, foreign owned ships would not be accepted for registration. The appellant, an Indonesian, had agreed that 92,000 shares of the company would be transferred to the respondent who would hold the shares on trust. When the respondent refused to deliver the share certificates after he had earlier signed on a blank share transfer form, the appellant brought legal proceeding against the respondent.

[28] In refusing to grant relief, the Singapore Court of Appeal made the following observation at p 175:

> In seeking the assistance of the Courts to enforce this equity, the appellant must come with clean hands; one of the maxims of equity is that he who comes into equity must come with clean hands. In this immediately antecedent to the transaction that gave rise to the trust;

> plainly on his past conduct the appellant fails to satisfy the test required of him in equity. On the finding of fact of the learned Judge, which Mr Hague accepted without reserve, the appellant in transferring the said shares to the respondent without any payment by the latter had practiced a deception on the public administration. The part played by him in this deception had soiled his hands and he can hardly expect the court to give effect to and enforce the trust in his favor

[29] This approach, namely, that the courts will not lend their hand to enforce a trust or other arrangements entered into to deceive public authorities was similarly adopted and applied by the Malaysian High Court in *Kondapuram Raghuram v. Soo Peng & Ors* [2006] 5 CLJ 634; [2006] 7 MLJ 510 at p. 524.

[30] In the circumstances, and in the absence of any evidence of a quasi-partnership, the removal of the plaintiffs or non re-election as directors was a matter for the company to exercise in a *bona fide* manner. The complaint that the directors were removed so that their wrongdoings would be kept hidden forever is made without basis and on disputed material. The Privy Council in *Tay Bok Choon v. Tahansan Sdn Bhd* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24; [1987] 1 MLJ 433 observed that in dealing with affidavit evidence, disputed allegations must be ignored (at p. 436):

> If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the dispute allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

[31] In any event, the question of removal of directors is not a complaint available *qua* shareholder and hence not one coming within the purview of s. 181 CA 1965 as observed by the Court of Appeal in *Soh Jiun Jen*, *supra* at p. 352. In the event, and for the aforementioned reasons, I do not think a case of oppression has been made on this ground.

Dilution Of Shareholding Challenge

[32] In this regard, on 3 July 2014, Kingsley and Kingston (together holding 60% of the registered shares of PPSB at the time) convened the EGM and passed resolutions to raise the authorised capital of PPSB from RM1,000,000 to RM10,000,000 and to have a rights issue of 4,920,000 units of new ordinary shares. The plaintiffs did not attend but sent their proxy who was not allowed to vote on the basis that the proxy forms were not deposited with the registered office within the stipulated time period.

[33] The plaintiffs allege that the real purpose of the rights issue was not to raise capital for PPSB but to dilute the plaintiffs' interest in PPSB thereby limiting the plaintiffs influence in the company in an attempt to force them to sell out in an unfair price. The plaintiffs claim this amounted to oppression.

[34] Now the usual purpose for an issue of shares is the raising of working capital for the company (*Howard Smith Ltd v. Ampol Petroleum Ltd and Others* [1974] AC 821). The power to issue shares is an advantage which belongs to the company itself and may only be utilized *bona fide* in the interests of the company and not for any collateral purpose (see para. 10.10 of *Corporate Powers Accountability* by Loh Siew Cheang, 2nd edn, 2002).

[35] In this regard, I think the defendants have adequately explained the reasons and justification for the need for an increase in the authorised and paid-up capital of the company which included the significant losses suffered at the group level amounting to about RM12 million thereby requiring further capital injections. This was based on the objective corporate documents which the court could not ignore. The objective documents also show that the plaintiffs knew about the increase in the authorised and paid-up capital and did not immediately complain about the unfairness of this exercise but only took issue with it some four months later.

[36] I also do not see how the plaintiffs are adversely affected as the increase of capital was across the board and that it was not a case of the defendants diluting the plaintiffs' majority as was the case in *Howard Smith*, *supra*, as well as the case of *Cheah Ngun Ying v. Low Cheong & Sons Sdn Bhd & Ors* [2010] 9 MLJ 385. The plaintiffs, as alluded to earlier, were always the minority and remain the minority after the increase of capital. Unlike the case of *Re a Company (No 005134 of 1986), ex parte Harries* [1989] 1 BCLC 383, this was not a case where the increase in capital was unilateral or done in secret. The instant case was also different from the case of *Re Cumana Ltd* [1986] 2 BCLC 430 where the offending act was a rights issue before capitalizing undistributed profits first. The Court of Appeal there upheld the finding that the proposed rights issue was part of a scheme to unfairly prejudice the minority shareholders' interests.

[37] In this connection, it is useful to hearken to the Privy Council's pronouncement in *Howard Smith*, *supra* as follows at p. 832:

> Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management's decision, on such a question, if *bona fide* arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.

[38] In the instant case, the objective documentary evidence showed that funds were required due to the substantial losses suffered by the group. There was therefore no justification for the court to intervene in this regard. In the circumstances, there is no basis for oppression on this ground as well.

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Conclusion And Orders

[39] In the circumstances, and for the reason stated, the claim as set out in the OS is without merit and is accordingly dismissed with costs. In respect of the OS, costs of RM55,000 is to be paid by the plaintiffs to the first, second and third defendants. There will be no order of costs in favour of the fourth defendant company.

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[40] In respect of the applications in encls. 11 and 20 for security for costs, there will be no order as to costs as the matter has now become academic. In respect of the application in encl. 13, since the said application by the plaintiffs is now withdrawn, the application is accordingly struck out with no order as to costs.

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